Central Law Journal

ESTABLISHED 1874

PUBLISHED WEEKLY

Vol. 100 ST. LOUIS, MO., JANUARY 28, 1927 No. 4

CONTENTS

$5.00 PER ANNUM PUBLISHERS 25c PER NUMBER

CENTRAL LAW JOURNAL COMPANY
ST. LOUIS, MO.

Entered at the Post Office at St. Louis as Second Class Matter under the Act of March 3, 1879.

Central Law Journal

St. Louis, January 28, 1927

TORT LIABILITY OF MANUFACTURERS AND VENDORS

By Lester W. Feezer*

The title page of Corpus Juris quotes a judicial utterance which is being made real in the life of the law in this country in cases involving the duty of manufacturers, vendors, and contractors to persons not in privity with them but who are damaged as a result of defects in their products. The quotation referred to is as follows:

"The law is progressive and expansive, adapting itself to the new relations and interests which are constantly springing up in the progress of society. But this progress must be by analogy to what is already settled."[1]

Hardly any field of the law is in a greater state of growth and flux than the law of tort, and in this changing, developing field of tort law there is perhaps no portion which has of late so well illustrated this capacity of the common law for growth, as the portion which deals with the topic which it is proposed to discuss herein. Granting all that ought to be granted in favor of the proverbial and necessary conservatism of the law there is room for growth in the law to enable it to take the account which in justice it ought of the demands of persons who have suffered personal injury or other loss under the circumstances mentioned in the first sentence.

It seems to be rather generally understood that a court of last resort in ruling on a question of law must be guided by several principles of relatively equal urgency. The court must have for its objects: first, to do justice between the parties litigant; second, to establish rules which will work well as general rules; third, to be so guided by the precedents of prior decisions that persons who are likely to, or who do, become involved in similar situations in the future may be assured with some certainty of the legal consequences of their conduct or status. It is submitted that, applying these postulates to the type of cases herein under consideration, the present tendency towards extending liability, even if carried to the logical limit hereinafter suggested, does no violence to any of them. If, as suggested by Judge Cardozo in the New York Court of Appeals,[2] "we take the liability of defendants in such cases out of the realm of contract and warranty and put it where it belongs, in the law"—we shall still be able to satisfy the "reasonable conservative" that the spirit at least of stare decisis is preserved.

The classic case with which any discussion of this topic must begin is Winterbottom v. Wright,[3] decided in England in the Court of Exchequer in 1842. In this case the declaration stated that the defendant had a contract with the postmaster-general to supply coaches for carrying the mails over a certain route under which he undertook to keep the coaches in a proper state of repair for this purpose. The plaintiff was a driver in the employ of another

*Reprinted by permission, from 10 Minnesota Law Review 1. The author is Professor of Law, University of South Dakota, Vermilion, South Dakota.

(1) Greene, C. J. in Hodges v. New England Screw Co., (1850) 1 R. I. 340, 356.

(2) McPherson v. Buick Motor Co., (1916) 217 N. Y. 382, 111 N. E. 1050, Ann. Cas. 1916C 440. The facts of this case are succinctly stated by Judge Cardozo in the first sentences of his opinion as follows: "The defendant is a manufacturer of automobiles. It sold an automobile to a retail dealer. The retail dealer resold to the plaintiff. While the plaintiff was in the car it suddenly collapsed. He was thrown out and injured. One of the wheels was made of defective wood and its spokes crumbled into fragments. The wheel was not made by the defendant; it was bought from another manufacturer. There is evidence, however, that its defects could have been discovered by reasonable inspection, and the inspection was omitted. There is no claim that the defendant knew of the defect and wilfully concealed it."

Judgment for the plaintiff as given in the Supreme Court and affirmed by the appellate division (160 App. Div. 55, 155 N. Y. S. 462) was affirmed.

"The question to be determined," said Judge Cardozo, "is whether the defendant owed a duty of care and vigilance to anyone but the immediate purchaser."

(3) (1842) 10 Mees. & W. 109, 11 L. J. Exch. 415.

person who had a separate contract with the postmaster-general to furnish horses and drivers and operate the coach. The plaintiff further declared that he relief on the defendant's contract to provide a safe coach and that the defendant in fact provided a coach having certain latent defects of which plaintiff did not know, and which broke down, causing plaintiff to be thrown and injured.

The decision of the case was in favor of the defendant, the court holding that the declaration was bad in substance. Although the action was brought in the form of an action on the case the plaintiff relied on the contract between the defendant and the postmaster-general and it was held that he could not recover as the defendant under the contract owed the duty of keeping the coach safe to the postmaster-general only and the plaintiff was not privy to that contract. Although the case was therefore decided, and doubtless correctly decided. on the pleadings,[4] the opinions contained language which in time came to be followed as authority for a rule that one who is injured by a defective chattel due to the negligence of the manufacturer, vendor, contractor, or other person supplying it, cannot recover, where the person so injured is not in privity of contract with the one who supplied it and who was guilty of the negligence resulting in the injury.

Suppose that not only Winterbottom v. Wright, but all its bastard offspring by way of exceptions are discarded, and that the courts have adopted the rule that, where all the causal factors are established, a manufacturer is liable to one who is injured by his negligently prepared product.[5] This surely does not violate the first postulate because it does do justice between the parties. Baron Alderson in his opinion in Winterbottom v. Wright admitted that the result involved hardship for the plaintiff, but refused to let that interfere with his conception of what reason and precedent requires. He says: "If we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop." This reasoning has of course been quoted with approval in many courts since, even in cases which refused to stop at the beginning, as Baron Alderson evidently thought proper.[6] Even now those jurisdictions which theoretically still adhere to the general rule of non-liability without privity of contract, because of their desire to do justice, are still finding new exceptions to it. These exceptions are chiefly by way of holding more and more things to be imminently dangerous to human life.[7] Still other exceptions are based upon the theory that the offending chattel, although perhaps not intrinsically dangerous to human life, nor so even because of a defect, is nevertheless so because of the maker's prior, accompanying or subsequent conduct.[8]

(4) "The case came up on demurrer to the plaintiff's declaration, which alleged his sole right to recover, his knowledge of and reliance upon this contract to which he was obviously not a party. But this was overlooked and certain dicta of Baron Alderson and Lord Abinger were seized upon to torture the case into an authority for the doctrine that when work is done under a contract or goods are made and sold the liability for negligence in performance or manufacture is restricted to those who are parties to the contract or sale." F. H. Bohlen, 35 Harv. L. Rev. 633-660. This is also pointed out by Brett, M. R. in Heaven v. Pender, (1889) L. R. 11 Q. B. D. 503, 52 L. J. Q. B. 702, 49 L. T. R. 357. See also 32 Harv. L. Rev. 89.

(5) McPherson v. Buick Co., (1916) 217 N. Y. 382, 111 N. E. 1050, Ann. Cas. 1916C 440; Coakley v. Prentiss-Wabers Stove Co., (1923) 182 Wis. 94, 195 N. W. 388; Sider v. General Electric Co., (1922) 203 App. Div. 443, 197 N. Y. S. 98.

This rule might perhaps better be stated as follows: "A manufacturer is liable to anyone who suffers a personal or property injury due to his product while such product is being used for the purpose for which it was intended, provided the proximate cause of the injury is a defect or condition of the product due to the negligent or other legally wrongful conduct of the manufacturer."

(6) Huset v. Case Threshing Machine Co., (1903) 120 Fed. 865, 57 C. C. A. 237, 51 L. R. A. 303.

(7) Chysky v. Drake Bros., (1920) 192 App. Div. 186, 182 N. Y. S. 459 (nail imbedded in cake); Coakley v. Prentiss-Wabers Stove Co., (1923) 182 Wis. 94, 195 N. W. 388 (gasoline camp stove); Pillars v. Reynolds Tobacco Co., (1918) 117 Miss. 490, 78 So. 365.

For collections of cases in which various things are held dangerous to life and health in this connection see the following: 4 A. L. R. 1090, 13 A. L. R. 1170, 17 A. L. R. 672, 29 Cyc. 478-486; notes 17 Harv. L. Rev. 274 and 22 Col. L. Rev. 680. A considerable number of cases are cited in the footnotes in 1 Bohlen, Cases on Torts 505, Cases illustrating things not treated as dangerous to life in this connection, 1 Bohlen, Cases on Torts 500.

(8) Because defendant knew of the defect: See cases cited in footnote 1 Bohlen, Cases on Torts 505; 29 Cyc. 481; Huset v. Case Threshing Machine Co., (1903) 120 Fed. 865, 57 C. C. A. 237, 61 L. R. A. 303, and cases cited therein.

Because defendant should have known of the defect: McPherson v. Buick Motor Co., (1916) 217 N. Y. 382, 111 N. E. 1050, Ann. Cas. 1916C 440;

The second postulate can be as well applied to the one result in these cases as to the other. The rule that defendant manufacturers shall be held liable for the injuries done by their "negligently defective products" is quite as good a general rule as the contrary, in the sense that it is just as easily applicable. Whether it works as well, from the standpoint of making reasonable, consistent law is of course another question. It is the purpose later to show that the body of law which has risen upon the foundation of Winterbottom v. Wright is inconsistent with the development of conceptions of liability in certain more or less analogous situations.[9] As already noted, much of the language in the opinions in Winterbottom v. Wright was directed to showing what a bad general rule it would establish to hold the defendant liable in that case. As decided, the loss rests where it falls. The result of holding for the plaintiff would be to shift the risk of loss, through injuries so caused, from the individual to the manufacturer and thus, through increased cost of production, effect its ultimate distribution upon society as consumers. A popular modern term for this is to call it paternalistic. But the objections of Baron Alderson and Lord Abinger and of those who fear this sort of paternalism are founded upon conceptions acquired in an age less mechanical, less industrial, and less "organized" than the one in which we are now living. The pressure of public demand has brought much legislation intended to establish so-called paternalistic substitutes for the previously existing rules of law. The opinions of certain members of the Supreme Court of the United States in recent years have taught us a great deal about the social and economic necessity of some of this kind of paternalism.[10] It has been said that the "fellow-servant rule" would not have come into the law in this country except for the fact that Lemuel Shaw was born on Cape Cod in Barnstable County and being familiar with no more complicated industrial process than that of two men at the opposite ends of a cross-cut saw, could see no reason why all fellow servants could not look out

Coakley v. Prentiss-Wabers Stove Co., (1923) 182 Wis. 94, 195 N. W. 388; Dail v. Taylor, (1909) 151 N. C. 284, 66 S. E. 135, 28 L. R. A. (N.S.) 949; Catani v. Swift & Co., (1915) 251 Pa. 52, 95 Atl. 931; annotation, 4 A. L. R. 1090.

This is indeed the general rule as to food and drugs which are mislabeled or contain impurities or are otherwise unfit for the purpose for which they are by their labels or their natural appearance obviously intended. Some of the cases seem almost to go beyond the conception of due care under the circumstances in preparing and inspection of the product prior to putting it on the market, and hold the defendant practically liable at peril. See Catani v. Swift & Co., (1915) 251 Pa. 52, 95 Atl. 931, contra to this latter proposition see 29 Cyc. 482, note 6, cases cited.

The inconsistency of excluding foods, drugs, etc., which turn out to be dangerous because impure or mislabeled, from the operation of the general rule of Winterbottom v. Wright, (1842) 10 Mees. & W. 109, 11 L. J. Exch. 415, is discussed by Prof. Bohlen, Affirmative Obligations in the Law of Torts, 53 U. of Pa. L. Rev. 360, who points out that they are not inherently dangerous but only become so when impure or mislabeled.

Because of fraud in deliberately concealing defects: Keulling v. Roderick Lean Mfg. Co., (1903) 88 App. Div. 309, 84 N. Y. S. 622, s. c 183 N. Y. 781, 75 N. E. 1098, 27 L. R. A. (N.S.) 303; Schubert v. Clark Co., (1892) 49 Minn. 331, 51 N. W. 1103, 32 A. S. R. 559, 15 L. R. A. 818; Langridge v. Levy, (1837) 6 L. J. Exch. 137, 2 Mees. & W. 519. See note 24 infra, for statement of rule in this case.

Because defendant failed to warn purchaser of the potential danger involved in the use of the article for its natural purpose: Sider v. General Electric Co., (1922) 203 App. Div. 443, 197 N. Y. S. 98; see note, 36 Harv. L. Rev. 762; Karstead v. Phil Gross Hardware Co., (1922) 178 Wis. 110, 190 N. W. 844; Henry v. Crocks, (1922) 202 App. Div. 19, 195 N. Y. S. 642; 29 Cyc. 479, note 91.

Because plaintiff is impliedly invited to use the article:

(a) On the defendant's premises; the leading case is Devlin v. Smith, (1882) 89 N. Y. 470; other cases cited 29 Cyc. 486, note 14.

(b) In general; Chysky v. Drake Bros., (1920) 192 App. Div. 186, 182 N. Y. S. 459.

(9) See pages infra, also notes 20 to 25 infra.

(10) Dissenting opinion of Taft, C. J. and Brandeis, J. in Adkins v. Children's Hospital, (1923) 261 U. S. 525, 67 L. Ed. 785, 43 Sup. Ct. 394. This is the famous "Minimum Wage Case" which, according to Taft, C. J. has the effect of overruling Muller v. Oregon, (1908) 208 U. S. 412, 52 L. Ed. 551, 28 Sup. Ct. 324, and re-establishes the doctrine of Lochner v. New York, (1905) 198 U. S. 45, 49 L. Ed. 937, 25 Sup. Ct. 539. In the latter case see dissenting opinion of Holmes, J. See also Bunting v. Oregon, (1917) 243 U. S. 426, 61 L. Ed. 830, 37 Sup. Ct. 139.

A case note, 1 Wis. L. Rev. 433, dealing with the precise point the present writer is endeavoring to make, says: "The tendency of the courts is more and more to extend the exceptions to the rule of a manufacturer's non-liability in tort to include an ever increasing field in which recovery may be permitted. This tendency is explained in part by the apparent injustice of adhering too strictly to the letter of these exceptions and confining them to the limited field in which they originated. The courts are no doubt also influenced in their decisions by the fact that these rules originated at a time when industrial development had not reached the stage of concentration of wealth in the hands of manufacturers that it has today. By extending the liability of manufacturers there is a more equitable distribution of loss, for, instead of the individual consumer or user having to stand his own burdensome loss, his loss is indirectly distributed throughout the industry."

for each other's careless acts.[11] Legal, as well as scientific, economic, sociological and political concepts of the relations between men, causes, and events must inevitably change with changing conditions. Time was, when the medical profession considered communicable disease a visitation of providence. As well might the court in McPherson v. Buick Motor Co., have called the defective automobile a visitation of providence in this day, as to have denied the plaintiff recovery because of lack of privity of contract. But, said Judge Cardozo in holding the defendant liable:

"We have put aside the notion that the duty to safeguard life and limb when the consequence of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law."[12]

The third postulate is that the court must not be so inconsistent that men will be uncertain what legal operation their conduct may have from day to day. But that was just the situation until the case of McPherson v. Buick Motor Car Co., because it was more or less uncertain from day to day what new and additional things the courts would hold to be "imminently dangerous to human life." In his recently published "The Growth of the Law,"[13] Judge Cardozo, without entirely answering himself asks this question: "What however was the posture of affairs before the Buick Case had been determined? Was there any law on the subject?"

Now have not most courts recognized, at least since 1883, that:

"Whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger or injury to the person or property of another, a duty arises to use ordinary care and skill to avoid such danger?"[14]

Even before this definition of negligence in Heaven v. Pender, the courts had begun to lay down exceptions to Winterbottom v. Wright and in spite of the perseverance of the general rule of non-liability the bar has not been discouraged. Exception after exception has become as well recognized as the general rule and some of the more recent cases seem to forecast that day when the old rule will be abandoned altogether.

(11) Farwell v. Boston & Worcester R.R. Co., (1842) 4 Metc. (Mass.) 49. "Where a master uses due diligence in the selection of competent and trusty servants, and furnishes them with suitable means to perform the service in which he employs them, he is not answerable to one of them, for an injury received by him in consequence of the carelessness of another while both are engaged in the same service." (headnote)

Here as in Winterbottom v. Wright, (1842) 10 Mees. & W. 109, 11 L. J. Exch. 415, talking about contract and ruling out the idea of tort, to inestimable mischief as the learned reader will, it is believed, concede. At page 60 Shaw, C. J., says: "The master is not exempt from liability, because the servant has better means of providing for his safety when he is employed in immediate connection with those from whose negligence he might suffer, but because the implied contract of the master does not extend to indemnify the servant against the negligence of anyone but himself—and he is not liable in tort because the person suffering does not stand towards him in the relation of a stranger but is one whose rights are regulated by contract express or implied."

Farwell v. Boston & Worcester R.R. Co., (1842) 4 Metc. (Mass.) 49, was decided the same year as Winterbottom v. Wright, (1842) 10 Mees. & W. 109, 11 L. J. Exch. 415, but about three months earlier, yet Shaw anticipated that case in the course of his opinion and suggested a result contra to the decision in the case as it was rendered in England. He says: "A case may be put for the purpose of illustrating this distinction. Suppose the road had been owned by one set of proprietors whose duty it was to keep it in repair and have it at all times ready and in fit condition for the running of engines and cars, taking a toll, and that the engines and cars were owned by another set of proprietors paying toll to the proprietors of the road and receiving compensation from passengers for their carriage, and suppose the engineer suffers a loss from the negligence of the switch tender. We are inclined to the opinion that the engineer might have a remedy against the railroad corporation; and, if so, it must be on the ground, that as between the engineer employed by the proprietors of the engine and cars, and the switch-tender employed by the corporation, the engineer would be a stranger between whom and the corporation there could be no privity of contract."

Except for the fact that the switch might be regarded as real estate (although, despite its attachment to the soil, it is essentially mechanical equipment) Justice Shaw has suggested a situation analogous to Winterbottom v. Wright throughout and has supposed identically the relation betwen plaintiff and defendant which in fact existed in Winterbottom v. Wright, he suggests that recovery should be permitted and for precisely the reason given by the Judges in the Exchequer for denying the plaintiff's right to recover.

(12) McPherson v. Buick Motor Co., (1916) 217 N. Y. 382, 111 N. E. 1050, Ann. Cas. 1916C 440. See note 29 Harv. L. Rev. 866.

(13) Cardozo, Growth of the Law, being a series of lectures delivered by Judge Cardozo at the Yale Law School in 1923.

(14) Heaven v. Pender, (1889) L. R. 11 Q. B. D. 503, 52 L. J. Q. B. 702, 49 L. T. R. (N.S.) 357.

This final step can hardly be greater than some of those which have already been taken.

Departures from this rule have been regarded as exceptions and at first these exceptions were strictly confined to cases involving the essential facts upon which such exceptions were based. It is only in some of the comparatively recent cases,[15] and in the suggestions of legal writers and reviewers[16] that one finds the frank recognition that the true test of liability for a "negligently defective product" to the user thereof rests directly upon the broad theory of "omission of due care under the circumstances." The reason for the tardy recognition of this truth is without doubt to be accounted for in the historically late development of the idea of negligence and the very recent full appreciation of its reach and power."[17]

That Winterbottom v. Wright, as it has been interpreted, represents a hiatus in the smooth and logical development of the idea of negligence as a basis of tort liability, is brought out by Professor F. H. Bohlen in his article on "Landlord and Tenant."[18] Professor Bohlen is dealing with the liability of a landlord for negligently making repairs in such a manner that the tenant or someone using the premises in his right is injured. He maintains that the result in Gill v. Middleton,[19] involving this situation, was correct, and points out that the liability which the court imposes in that case (the undertaking being gratuitous) was essentially a tort liability. Bohlen says in this connection:

"The liability now under discussion is at least on the surface closely analogous to two liabilities enforced by actions of tort which are either universally or generally limited to those with whom the defendant directly deals: (1) The liability for misrepresentation as enforced in the action of deceit, and (2) the liability of a manufacturer of a dangerously defective product."

The analogy between deceit and the liability of the landlord as discussed by Professor Bohlen is essentially similar to that between the deceitful representation and the act of the manufacturer who puts out a defective product. He says: "It is submitted that the principles of the action of deceit should not be extended beyond its own particular field,"[20] and again two pages farther on, "Since warranties did not run with the goods bought in reliance on them, it was almost inevitable that it should be held that the right to recover

(15) McPherson v. Buick Motor Co., (1916) 217 N. Y. 382, 111 N. E. 1050, Ann. Cas. 1916C 440; Skinn v. Reuter, (1903) 135 Mich. 57, 97 N. W. 152, 106 A. S. R. 384, 63 L. R. A. 743; Sider v. General Electric Co., (1922) 203 App. Div. 443, 197 N. Y. S. 98; Henry v. Crooks, (1922) 202 App. Div. 19, 195 N. Y. S. 642; Coakley v. Prentiss-Wabers Stove Co., (1923) 182 Wis. 94, 195 N. W. 388; Quackenbush v. Ford Motor Co., (1915) 167 App. Div. 433, 153 N. Y. S. 131; Pillars v. Reynolds Tobacco Co., (1918) 117 Miss. 490, 78 So. 365; Karsteadt v Phil Gross Hardware Co., (1922) 179 Wis. 110, 190 N. W. 844; Wright v. Howe, (1915) 46 Utah 588, 150 Pac. 956, L. R. A. 1916B 1104; Parks v. Yost Pie Co., (1914) 93 Kan. 334, 144 Pac. 202; Mazetti v. Armour & Co., (1913) 75 Wash. 622, 135 Pac. 633; Murphy v. Sioux Falls Serum Co., (1921) 44 S. D. 421, 184 N. W. 252; Heaven v. Pender, (1889) L. R. 11 Q. B. D. 503, 52 L. J. Q. B. 702, 49 L. T. R. (N.S.) 357, may be regarded as forecasting this principle of liability. Glimmerings of it also appear in a few other cases prior to McPherson v. Buick Motor Co., (1916) 217 N. Y. 382, 111 N. E. 1050, Ann. Cas. 1916C 440, for example Schubert v. Clark, (1892) 49 Minn. 331, 51 N. W. 1103, 32 A. S. R. 559, 15 L. R. A. 818; Mazetti v. Armour & Co., (1913) 75 Wash. 622, 135 Pac. 633; Wright v. Howe, (1915) 46 Utah 588, 150 Pac. 956, L. R. A. 1916B 1104; and Skinn v. Reuter, (1903) 135 Mich. 57, 97 N. W. 152, 63 L. R. A. 743, 106 A. S. R. 384; are not decided directly on the negligence basis but are to be regarded by reason of the dicta they contain as indicating the gathering consciousness of a new rule of reason in dealing with these cases.

(16) Terry, Negligence, 29 Harv. L. Rev. 40-53. "A person who delivers a thing to another or furnishes a thing for another's use, comes under duties to use due care either not to deliver or furnish a thing which is unreasonably dangerous at all, or, if the thing is dangerous but it is not wrong to deliver or furnish it, to take precautions, if reasonableness requires that, against the danger."

The above quotation from the article cited deals with the second of Mr. Terry's five classifications of affirmative duties independent of contract and the violation of which are stated by the author to give rise to rights of action based upon negligence. This article defines negligence as conduct which involves an unreasonably great risk of causing damage.

See also articles by Prof. Bohlen, viz., The Basis of Affirmative Obligations in the Law of Torts, 53 U. of Pa. L. R. 209; Landlord and Tenant, 35 Harv. L. Rev. 633.

The following are a few of the many law review notes which have been consulted:

2 Col. L. Rev. 105; 22 Col. L. Rev. 764; 22 Mich. L. Rev. 497; 70 Pa. L. Rev 135; 17 Harv. L. Rev. 274; 15 Harv. L. Rev. 166; 19 Harv. L. Rev. 372; 32 Harv. L. Rev. 89. A most excellent and important note on this point, 30 Yale L. J. 607.

Other such notes are cited in various footnotes.

(17) Thayer E. R., Liability Without Fault, 29 Harv. L. Rev. 801.

(18) 35 Harv. L. Rev. 633.

(19) (1870) 105 Mass. 477.

(20) 35 Harv. L. Rev. 654.

upon a fraudulent misstatement did not pass to one who succeeds to rights acquired in reliance thereon," and on the same page this: "So too the limitation of liability in deceit to those to whom the statement is made and whom the maker intends to act upon it, followed almost inevitably from the close analogy of deceit to actions on warranties."[21] Where the plaintiff is allowed recovery in actions involving the rule drawn from Winterbottom v. Wright the result is usually reached by referring the case to one of the exceptions, although there are cases which allow the plaintiff to recover by saying that he, as a user of the article, was within the contemplation of the defendant when he sold the thing.[22] Some of these later cases have apparently treated the plaintiff's right as resting on a sort of implied warranty.[23] So many are the cases which say the plaintiff was "impliedly invited" by the defendant to use the article, because of the defendant's knowledge of the existence of the plaintiff, either as an individual or even as merely one of a class for whose use the article was intended, that they may perhaps be regarded as one of the established exceptions to Winterbottom v. Wright.[24] Indeed where the dangerous thing is to be used on the defendant's real estate and was made or put there by the defendant for that use, there is a very respectable body of authority which seems to hold this circumstance enough to take the case quite outside the scope of the Winterbottom v. Wright rule.[25] In this situation we are of course approaching very close to Gill v. Middleton, or the plaintiff may in such case be regarded as an invitee on real estate, which of course puts the case in quite a different category so far as both authority for and theory of allowing recovery are concerned.[26]

(21) As to this analogy to warranty see also Prof. Williston's article on Liability for Honest Misrepresentation, 24 Harv. L. Rev. 415 in which he says: "It is common enough in our law to find that several parts of it which have grown up with little regard to each other, have, nevertheless, logical intimate connection and the doctrines laid down in one set of cases are hardly reconcilable with those established in others."

If we wish to trace these analogous doctrines back far enough in the search for a common source, we may perhaps find the first error in the early history of assumpsit. The horse doctor was liable on his undertaking because of the public nature of his calling and although his customer has no covenant upon which to base an action he can bring an action of "case" and is permitted thus to recover in an action which sounds in tort. Horse Doctor's Case, (1440) 19 Hen. IV 49, 5. But if a carpenter fail entirely to erect a building as per his promise there is no remedy because an assumpsit cannot be shown, his calling (unlike the horse doctor's) not being of a public nature.

"From very early times, prior to the development of assumpsit, a vendor was not liable to the vendee for any defect of title or quality in the chattel sold unless he had either given an express warranty or was under a public duty from the nature of his calling to sell articles of a certain quality. Stuart v. Wilkins, (1778) 3 Doug. 18, is said to have been the first instance of an assumpsit upon a vendor's warranty." Ames, History of Assumpsit, 8 Harv. L. Rev. 1-8. In short privity of contract was by the time of the case cited by Ames, sufficient to raise an implied warranty. The present transition to a recognition of the tort nature of vendors' and manufacturers' liability for defective products is a logical sequence and that contention finds historical justification in the fact that the duty where privity of contract does exist, was first enforced in the absence of an express promise, through a tort action of trespass on the case, (although to be sure limited to cases of public callings).

(22) Langridge v. Levy, (1837) 2 Mees. & W. 519.

(23) See Chysky v. Drake Bros., (1920) 192 App. Div. 186, 182 N. Y. S. 459. An action by a plaintiff whose mouth was injured by a wire nail concealed in a piece of cake made by defendants. The plaintiff did not buy it directly from defendants, however. The court held that the implied warranty to the retailer inured to the plaintiff who can recover either for breach of warranty or for negligence. The case is discussed in a note, 20 Col. L. Rev. 924, which points out that no negligence was alleged or proved, thus making the result depend upon the warranty "running" to the subsequent retail vendee—a result contra to the great majority, if not all of the cases discussing this point.

(24) Langridge v. Levy, (1837) 2 Mees. & W. 519, was argued by the plaintiff's counsel in Winterbottom v. Wright as calling for the application of the idea of running warranty but Baron Alderson distinguished it, saying that Langridge v. Levy turned on the question of fraud in the defendant in deliberately making a false statement with the intent of having it acted on and the plaintiff being the person who from his knowledge must have been forseen or foreseeable to him as the party likely to be damaged.

(25) This is the second of the exceptions as stated in Huset v. Case Threshing Mach. Co., (1903) 120 Fed. 865, 57 C. C. A. 237, 51 L. R. A. 303. This doctrine will serve as a basis for some cases not otherwise explainable in jurisdictions recognizing Winterbottom v. Wright as laying down the general rule. For example, Heaven v. Pender could be explained on this ground as possible in the same jurisdiction with Winterbottom v. Wright, although as pointed out the language of the court in Heaven v. Pender is much broader. See note 26 infra. In this connection see also Devlin v. Smith, (1882) 89 N. Y. 470; Conners v. Great Northern Elevator Co., (1904) 90 App. Div. 311, 85 N. Y. S. 644; Elliott v. Hall, (1885) L. R. 15 Q. B. D. 315, 54 L. J. Q. B. 5-8; Swan v. Jackson, (1889) 55 Hun 194, 7 N. Y. S. 821; Hayes v. Philadelphia, etc., Coal Co., (1890) 150 Mass. 457, 23 N. E. 225.

(26) See language of Brett, M. R. in Heaven v. Pender which would seem to put the liability of the owner of real estate on the basis of pure negligence. The writer of a note 2 Col. L. Rev. 105 after discussing Schubert v. Clark Co., (1892) 49 Minn. 331, 51 N. W. 1103, 32 A. S. R. 559, 15 L. R. A. 818; George v. Skivington, (1869) L. R. 5 Ex. 1 (the hair restorer case) and Teal v. American Mining Co., (1901) 84 Minn. 320, 87 N. W. 837, says by way of pointing out that these cases can hardly be reconciled with the exceptions to the rule of the Winterbottom Case: "But it can hardly be said that a defective stepladder is more dangerous to human life than was the defective

The most frequently quoted summary of the Winterbottom v. Wright exceptions is probably that found in Huset v. Case Threshing Machine Co.[27] In this case Sanborn, J., stated the general rule and following exceptions:

"The first is that an act of negligence of a manufacturer or vendor which is imminently dangerous to the life or health of mankind, and which is committed in the preparation or sale of an article intended to preserve, destroy, or affect human life is actionable by third persons who suffer from the negligence.[28] The second exception is that an owner's act of negligence which causes injury to one who is invited by him to use his defective appliance upon the owner's premises may form the basis of an action against the owner. The third exception to the rule is that one who sells or delivers an article which he knows to be imminently dangerous to life or limb to another without notice of its qualities is liable to any person who suffers an injury therefrom which might have been reasonably anticipated whether there were any contractual relations between the parties or not."

This then is the chart by which the courts have endeavored to steer in determining the limits of manufacturers' and vendors' liability for "negligently defective products." With only these three fixed points, the field was mapped on too large a scale and it has inevitably resulted that there is much confusion in the cases. Rather naturally not all jurisdictions have agreed as to what is imminently dangerous.[29] Foods, drugs, weapons, and explosives are pretty generally conceded to fall in this class and machinery has more recently been regarded as at least potentially so. New York reports are especially prolific in cases bearing upon the problem. In the earlier New York cases machinery was regarded as not *imminently* dangerous, because not *inherently* so,[30] but this rule was later abandoned in New York[31] as well as in many other states and it came to be admitted that "although the thing is not inherently dangerous, if the defendant's negligence makes it

stage-coach in Winterbottom v. Wright." This note expresses the view that the above cases must be put upon the theory of Brett, M. R. in Heaven v. Pender, (1889) L. R. 11 Q. B. D. 503, 52 L. J. Q. B. 702, 49 L. T. R. (N.S.) 357, where he says, "Where in omitting to perform a contract, in whole or in part, one also omits to use ordinary care to avoid injury to third persons, who, as he could with a slight degree of care foresee, would be exposed to risk by his negligence, he should be liable to such persons for injuries which are the proximate result of such negligence.

Notwithstanding the language used in Heaven v. Pender, it cannot be said that the English courts have abandoned the views expressed in Winterbottom v. Wright for the broader test of "care according to the circumstances." In Earl v. Lubbock, (1905) 1 K. B. 253, 1 Ann. Cas. 753, the court of appeal approved the general rule laid down in the Winterbottom Case declaring that the decision in that case has since 1842 stood the test of repeated discussion. The principles stated by Lord Abinger were referred to and approved as being based on sound reasoning.

For a general survey of the course of English decisions on this question see the opinion in McPherson v. Buick Motor Co., (1916) 217 N. Y. 382, 111 N. E. 1050, Ann. Cas. 1916C 440.

(27) (1903) 120 Fed. 865, 57 C. C. A. 237, 51 L. R. A. 303.

(28) This statement of the exception so well recognized does not bring out fully the distinction which has been taken between things imminently dangerous because inherently so, viz., intrinsically, in their natural state and those which become so by reason of their defects. This distinction has become important in some jurisdictions at least. See notes 30 and 31 and accompanying text.

(29) "So numerous are the exceptions to the general rule in favor of foods, drugs and articles imminently dangerous to human life and so numerous and varied are the opinions as to what is imminently dangerous, that the exceptions might be said to be the rule." 32 Harv. L. Rev. 89, note to Pillars v. Reynolds Tobacco Co., (1918) 117 Miss. 490, 78 So. 365, holding manufacturer liable to consumer who contracted ptomaine poisoning from foreign substance in chewing tobacco. See also 29 Harv. L. Rev. 866, note on McPherson v. Buick Motor Co., commenting on the extent to which the exception had been carried in New York prior to the Buick Case.

(30) Kuelling v. Roderick Lean Co., (1904) 88 App. Div. 309, 84 N. Y. S. 622, the land roller case.

(31) Kahner v. Otis Elevator Co., (1904) 96 App. Div. 169, 89 N. Y. S. 185. The court said in this case: "This is undoubtedly an extension of the rule but it has its support in authority," citing Devlin v. Smith, (1882) 89 N. Y. 480.

To the same effect are later New York cases including Statler v. Ray, (1908) 125 App. Div. 69, 109 N. Y. S. 172, affirmed on this point 195 N. Y. 478, 88 N. E. 1063. In this case a steam coffee urn exploded injuring the plaintiff who was president of the hotel company which had purchased it. The hotel company had purchased it of a jobber and not directly from the manufacturer. The court of appeals said: "This leaves on this branch of the case simply the question whether a manufacturer and vendor of such an inherently dangerous appliance as this may be made liable to a third party on the theory of the plaintiff (viz., that the defendant, knowing the use for which it was intended, was chargeable with knowledge of the defective and unsafe condition) and we think that this question must be regarded as settled in the plaintiff's favor."

Likewise, Torgeson v. Schultz, (1908) 192 N. Y. 156, 84 N. E. 956. Plaintiff having no contract relation with defendant was permitted to recover for injury caused by the bursting of a siphon bottle filled and sold by defendant.

dangerous, that is enough to fix liability upon him.''[32]

Of course where the defendant knows of the dangerously defective nature of his product, as Langridge v. Levy (2 Mees & W. 519), and sells it in that condition, the important question is not whether the danger is one inhering in the product in its natural state or merely arising out of the defect, but, rather, whether the defendant informed the purchaser of this condition of the product. One may sell defective products to a purchaser who buys with full knowledge, but where the manufacturer or vendor who puts out the product conceals this fact the user who is injured in consequence, even though he be not in privity, will be permitted to recover. Some of the cases show an inclination to assimilate this situation to deceit. Whether the court does this or merely treats the case as an exception to Winterbottom v. Wright is immaterial as far as the plaintiff's right to recover is concerned. At any rate the rule is well established in favor of the plaintiff in such cases.[33]

Today, not only have legal authors, unhampered by precedent, put aside all exceptions as the test of liability in cases of the sort under consideration, but cases have been decided and opinions written, at least a few of them, saying that a manufacturer whose negligence is responsible for a defective product shall be liable to a consumer or user injured in consequence, not because of a more or less arbitrary test of the thing's dangerousness to life bringing it within an exception to an odious rule, but because he was negligent in the performance of a duty imposed by the law.

(To be concluded in next number)

(32) A case note 17 Harv. L. Rev. 274 on the case of Skinn v. Reuter, (1903) 135 Mich. 57, 97 N. W. 152, 63 L. R. A. 743, 106 A. S. R. 384 says: "As the law is, the only question open is, 'what articles are dangerous to life?' " The note quoted was prepared at that stage in the development of the New York Law represented by Kuelling v. Roderick Lean Co., (1904) 88 App. Div. 309, 84 N. Y. S. 622. The New York rule at that time fixed as the test of what was imminently dangerous, the nature of the article in its ordinary state, and the Michigan case noted determined the imminently dangerous character of the offending article by reference to its defective state. As already stated New York adopted this broader test in Kahner v. Otis Elevator Co. (1904) 96 App. Div. 169, 89 N. Y. S. 185, and has reiterated it in the Buick Case and other more recent decisions.
It is further suggested in the case note referred to that the Michigan test, viz., the nature of the article in its defective state is the better one for the following reasons: First, because it is more accurate; the seller is held liable because his negligence endangers the public and this depends on what the article actually is, not on what it would be if perfect; second, it is more convenient. It greatly reduces the difficulty of deciding what articles are dangerous; third, it is more just, because it tends to broaden the scope of the existing rule which in any event is too narrowly construed.

(33) This was really the basis of the Skinn v. Reuter case cited in note 32. Recent cases taking this position nclude: Thornhill v. Carpenter-Morton Co., (1915) 220 Mass. 593, 108 N. E. 474; Henry v. Crooks, (1922) 202 App. Div. 19, 195 N. Y. S. 642; Sider v. General Electric Co., (1922) 203 App. Div. 443, 197 N. Y. S. 98. See note 40 infra, quoting opinion in this case.

Older cases on this point, 29 Cyc. 482 note 6, show especially the negative application of this rule.

EDITORIALS AND COMMENTS

EVIDENCE OF INDEMNITY INSURANCE

A rule of practice that:

Where a plaintiff in a personal injury action seeks by appropriate interrogatories on the cross-examination to discover whether the defendant is indemnified from loss by an insurance company, it is error for the court to sustain an objection to interrogatories which tend to develop the fact on that question,

has been formally adopted by the Nebraska Supreme Court in Jessup v. Davis, 211 N. W. 190. (See opinion, post.) Three members of the court concurred in a dissenting opinion in which, among others things, it is shown that at least 27 of the states besides the federal courts are committed to the contrary view.

The matter is of great importance to litigants, both plaintiff and defendant. There is much to be said for as well as against such a rule. In the instant case the reasons and arguments in the majority opinion are certainly not adequately answered in the dissent. Without undertaking to say which view is correct in principle or sounder in policy, we venture the prediction that several other courts will follow the Nebraska rule.

RECENT CASES

NEBRASKA ADOPTS RULE THAT PLAINTIFF MAY ON CROSS-EXAMINATION COMPEL DISCLOSURE THAT DEFENDANT IS PROTECTED BY INDEMNITY INSURANCE.—Acting pursuant to constitutional authorization to promulgate rules of practice and procedure for all courts, the Supreme Court of Nebraska, in Jessup v. Davis, 211 N. W. 190, formally adopted a rule, previously stated in Miller v. Central Taxi Co., 110 Neb. 306, 193 N. W. 919, providing that:

"Where a plaintiff in a personal injury action seeks by appropriate interrogatories on the cross-examination to discover whether the defendant is indemnified from loss by an insurance company, it is error for the court to sustain an objection to interrogatories which tend to develop the fact on that question."

That part of the opinion relating to the question, is as follows:

The gist of the contention of those seeking the rescission of the rule announced in Miller v. Central Taxi Co., supra, is that in a personal injury action the discovery by the trial jury of an existing relation between insurer and assured, as to facts in controversy, operates to prejudice the jurors to such a degree as to assure the return of a verdict against the defendant irrespective of the preponderance of the evidence on the issues involved; and the mere suggestion of such condition by plaintiff's attorney is fraught with so serious consequence that the occurrence of the same could be deemed ample ground of mistrial.

Assuredly, a relation between parties to be prejudicial would depend in part, at least, upon what that relation actually is. It is obvious that, so far as the question before us is concerned, the contaminating relation is contractual. Section 7882, Comp. St. 1922, provides:

"No insurance policy or certificate of any kind shall be issued or delivered in this state unless and until a copy of the form thereof has been filed with the department of trade and commerce and approved by it."

The records of this department, therefore, will afford us all facts necessary for the determination of this matter as applied, of course, to the adoption of the proposed rule. We find that there are many similarities and substantial agreements in the provisions of the policies filed as required by the above act.

If we take a typical policy, we find the character of indemnity, provided by the policy, is set forth as an insurance "against loss or expense, arising or resulting from claims upon the assured for damages in consequence of an accident occurring within the limits of the United States and Canada during the term of the policy, by reason of the ownership, and maintenance or use * * * of the automobile or any of the automobiles enumerated and described herein resulting in" an injury to persons, or damage to property, the company's liability being ordinarily limited to $5,000.

It also provides:

"In addition to the above, the company does hereby agree (1) to defend in the name and on behalf of the assured any suit brought against the assured to enforce a claim whether groundless or not, on account of damages suffered or alleged to be suffered under the circumstances hereinbefore described; (2) to pay the expenses incurred in defending any suit described in the preceding paragraph, also the interest on any judgment within the limits of the insurance hereby granted and any costs taxed against the assured on account thereof; (3) to reimburse the assured for the expense incurred in providing such immediate surgical relief as is imperative at the time of any accident covered hereunder."

And the further paragraphs provide:

"The company reserves the right to settle any claim or suit. The assured shall not voluntarily assume any liability; nor interfere in any negotiations or legal proceedings conducted by the company on account of any claim; nor, except at assured's own cost, settle any claim; nor, without the written consent of the company previously given, incur any expense, except as provided herein for immediate surgical relief at time of accident. Whenever requested by the company, the assured shall aid in securing information, evidence and the attendance of witnesses in effecting settlements and in defending suits hereinbefore referred to. The assured shall at all times render to the company all reasonable co-operation and assistance. In case of payment of loss and/or expense under this policy, the company shall be subrogated to all rights of the assured against any person, copartnership, corporation or estate as respects the amount of such payment, and the assured shall execute all papers required and shall co-operate with the company to secure to the company such rights."

While there is some diversity in the provisions of the policies on this subject, in many policies at least the assured is plainly indemnified against loss only, and not against liability. And if we consider the provisions of the policy, above quoted, in connection with "instructions to the assured," we may vizualize the transaction which appears in the event of an accident, as follows:

"Required for assured: Stop at once, obtain name and address of injured and where taken after accident. Obtain names, addresses and telephone numbers of witnesses, and, if other car involved, name and address of owner,

license number, make and number of car, and in what company insured. Telegraph or telephone the home office or the nearest branch office the above information, giving also the data regarding owner, car and policy appearing on the reverse of this card. Follow verbal report at the earliest opportunity with written statement on the claim blanks provided. Do not admit liability. Make no comment or statement regarding the accident to anyone except police or an identified representative of this company."

On the part of the insurer is necessarily involved, from the nature of the business in which it is engaged, its maintenance of a staff of attorneys, investigators and experts; on occurrence of an accident in which its policyholder is involved, upon "immediate notice" received, the prompt appearance of its efficient and paid investigators upon the scene, thorough investigation of the facts, interviews with all parties (if possible) and of all persons having knowledge of facts and full reports of the same, together with measures taken to preserve and secure favorable evidence, maps and photos. Thereafter the insurer settles or litigates, as the conditions of the accident, the situation and standing of the parties involved, views of monetary considerations, may deem wise.

If litigation follows, the defense is to be conducted "in the name of the defendant," it is true, but by the insurer's attorneys, along lines wholly determined by the insurer, and to the extent that the insurer's interests may determine. The witnesses, whose testimony may be used in behalf of the defendant, are exclusively selected by the insurers, and are all obtained by efforts of its agents, and are necessarily in many cases employees, employed for the purpose of assuring success in expected litigation. If the resulting decision be finally adverse, to the extent of the policy, the insurer satisfies the judgment and defrays the cost of attorneys and expenses of litigation. Indeed, after the occurrence of the accident and notice to the insurer, the entire matter is within the absolute control of the insurance company. It litigates or settles as its interests may determine. The assured has, by his agreement, waived all right to object, influence, or in any manner control the ensuing proceedings whether of litigation or settlement. He thereafter acts and participates only to the extent and in the manner the insurer may request or direct.

As to its general nature it may be observed in passing that the transaction before us is clearly within the reason upon which the early English doctrine of champerty and maintenance was based. 11 C. J. 234, § 5. Even so, the fact of liability insurance of itself is not proof of negligence, and the mere fact of insurance alone should not be determinative in the return of a jury's verdict. But, on the other hand, the existence of insurance should not deprive the injured of his ordinary rights of proof. To the extent of its policy the insurer must be consider as at least one of the real parties in interest. This court is now invoked to announce a rule of practice which would afford insurance companies, real parties in interest and actually controlling litigation, the benefits of a "benevolent judicial concealment" therein, so that their identity, presence and interest may remain totally unknown to the jurors before whom the litigation is tried. In justice to opposing litigants, can this request be complied with?

The acid test of truth in judicial proceedings is cross-examination. It is admittedly the most efficacious agency which the law has devised for the discovery of truth. The ordinary rule is, by cross-examination, the situation of the witness with respect to the parties in interest, and to the subject of litigation, his interest, his motives, his inclination and prejudices, may all be fully investigated and ascertained, and submitted to the consideration of the jury before whom he has testified, and who have had the opportunity of observing and determining the just weight and value of his testimony. 1 Greenleaf, Evidence (16th Ed.) § 446.

Bias or interest of a witness is always recognized as proper to be considered by the jury. 5 Chamberlayne, Modern Law of Evidence, § 3752. And the fact of business relations with, or employment by, a party may be shown. 5 Chamberlayne, Modern Law of Evidence, § 3753.

Where the witness has received or has been promised any reward for giving testimony, it is a proper subject of cross-examination. Matter of Will of Snelling, 136 N. Y. 515, 32 N. E. 1006; Blenkiron v. State, 40 Neb. 11, 58 N. W. 587.

In this connection it is not to be forgotten that one of the valuable considerations the defendant has given for his indemnity is his express promise to "at all times render to the company reasonable co-operation and assistance, and whenever requested by his company to aid in securing information and evidence * * * and in defending suit brought."

In view of these obligations, can it be said that such a defendant does not sustain business relations with or employment by the real party in interest which would form a proper subject of cross-examination under the rule above quoted? So, too, when the "efficient investigator," the physician, and the hired expert witness, and other witnesses, all of whom may regularly and permanently be employed and

compensated by the insurance company, whose real interests are involved in this suit, are by it produced and tendered as witnesses in its behalf as real parties in interest even though its identity as such is not shown by the record, does the fact that the defense, by secret agreement, is made in the name of the third party, operate to suspend or change the rules of cross-examination?

And though these witnesses might truthfully answer that they were strangers to the named defendant, and were not employed by and, in fact, sustained no business relations whatever with him, does justice demand that such questions and answers should constitute the limit of the permitted cross-examination?

This appears to be the controlling reason upon which the opinions of this court, attacked in this proceeding, have been based. The last pronouncement of this tribunal is the case of Miller v. Central Taxi Co., 110 Neb. 306, 193 N. W. 919. His honor, Judge Dean, in the course of the opinion approved by us in that case, stated the facts, upon which the syllabus was written, to be as follows:

"Counsel complains of misconduct on the part of plaintiff in that he offered to show that Mr. Borsky, the president of the defendant company, went to the viaduct soon after the accident to make some surface measurements, and that he took with him an attorney for an insurance company (presumably the company interested in the suit) to assist him who was not an attorney employed by him in the present case. The offer was denied. The argument is that plaintiff sought by this means to convey to the jury the intelligence that the company was indemnified against loss by an insurance company. Complaint is also made in that an apparent attempt was made to convey the same intelligence to the jury in the cross-examination of Mr. Borsky. The witness was not permitted to answer. We think the court erred in its ruling. The question is not new in this state. We held in a like case that, if the defendant was not resisting plaintiff's demand in its own behalf, but that some insurance company was defending under the cover of defendant's name, plaintiff had a right to make that fact known to the jury. Egner v. Curtis, Towle & Paine Co., 96 Neb. 18 (146 N. W. 1032, L. R. A. 1915A, 153.)"

Turning to the Egner Case we find the following approved by us and placed in the syllabus:

"(1) Where a defendant, in a personal injury action, is indemnified by an employers' casualty insurance company, it is proper for plaintiff's counsel to show such fact when impaneling the jury, and to inquire of each juror upon his voir dire if he is a stockholder or agent, or in any manner interested in such company. (2) In an action for personal injuries, plaintiff, to prove an admission of liability, may show a demand made on defendant for payment for his injuries, and that defendant, through its general manager or duly authorized agent, made such admission. (3) And in such a case, if such general manager or duly authorized agent puts a refusal of defendant to pay solely on the ground that it is insured and for that reason it cannot pay, plaintiff is entitled to have the conversation admitted and the evidence submitted to the jury, under suitable instruction, for them to determine what the true import of the conversation was."

We would suggest that if it is competent to prove such a statement by the appearing defendant, why would it not be competent to prove the real agreement between the insurer and the insured, as the contract certainly contains such a provision, and such a situation is presented to every court in such a case? As to this right under our holding, we are strengthened by paragraph 4 of the syllabus in the Egner Case, wherein we held:

"It appears that after plaintiff was injured a physician, unknown to, and without authority from him, was called to treat his injuries, and without any subsequent employment by plaintiff continued to treat him for a considerable period of time. Upon the trial plaintiff's counsel called such physician to the witness stand, and attempted to show by him who employed him. Held, not misconduct on the part of counsel."

In the course of the opinion we use the following language:

"We are unable to give our assent to this contention for two reasons: First, in our judgment, it could not have prejudiced the defendant with the jury; second, the error of the court was in not overruling the objection, as it should have done. Upon this point we concede that the authorities, cited from other states, are conflicting; but we think the correct rule is the one announced in Foley v. Cudahy Packing Co., 119 Iowa, 246 (93 N. W. 284); Brusseau v. Lower Brick Co., 133 Iowa, 245 (110 N. W. 577); Spooniek v. Backus-Brooks Co., 89 Minn. 354 (94 N. W. 1079); Antletz v. Smith, 97 Minn. 217 (106 N. W. 517); Citizens' Light, Heat & Power Co. v. Lee, (182) Ala. (561), 62 So. 199; Swift v. Platte (on rehearing) 68 Kan. 10 (74 P. 635); Iroquois Furnace Co. v. McCrea, 191 Ill. 340 (61 N. E. 79). In Spoonick v. Backus-Brooks Co., supra, it is said (page 359 [94 N. W. 1081]): 'It is no answer to this to say that the insurance company is not named as a party to this action, for the bias of the juror is not to be determined by this fact. Nor is it an answer to say that counsel may protect his client by using a peremptory challenge. It is his right first to learn the facts, and he must do so to exercise intelligently his right to challenge peremptorily. * * * In order to secure to litigants unbiased and unprejudiced jurors, we are compelled to hold that plaintiff's counsel had a right to ascertain whether there was such a relationship between the persons called as jurors and the insurance company, a corporation vitally interested in the result, which would disqualify these persons, because, by implication, they would be biased and prejudiced."

In furtherance of such conclusion we cited Anderson v. Duckworth, 162 Mass. 251, 38 N.

E. 510. The holding in the Egner Case was followed in Koran v. Cudahy Packing Co., 100 Neb. 693, 161 N. W. 245, wherein Judge Letton, in the course of the opinion, stated:

"However, in Egner v. Curtis, Towle & Paine Co., 96 Neb. 18 (146 N. W. 1032, L. R. A. 1915A, 153), this court held that such examinations (on voir dire) may be permitted, and the district court was justified in following that decision."

It is to be noted that the Egner Case was decided in 1914, and the case of Miller v. Central Taxi Co., supra, was decided in 1923. And though our biennial Legislature has been in regular session, there has been no legislative protest or objection to the principles announced in these cases.

In fact, it seems to me that we are committed to the doctrine that the insurance company, under its contract of insurance with the defendant, becomes and is the sole interested party defendant, at least to the extent of its insurance. In a very recent case, to wit, Cox v. Detroit United Ry., 234 Mich. 597, 208 N. W. 745, the following is announced as the law:

"In action by soldier in United States army for injuries in collision between motor vehicle, in which he was riding, and defendant's street car, defendant's evidence that plaintiff was not real party in interest because of War Risk Insurance Act, § 313, as added by Act Oct. 6, 1917 (U. S. Comp. St. Ann. Supp. 1919, § 514tttt), held erroneously excluded, though such defense was not specially pleaded; Comp. Laws 1915, § 12353, providing that every action shall be prosecuted in name of real party in interest, being mandatory."

We have a similar section providing that all actions shall be prosecuted by the real parties in interest. The reason for such a section is so that the actual status of the case may be apparent to the entire court, including the jury. If this is the reason, then why is it not just as important that the real parties in interest as defendants shall appear? We have heretofore arrived at the conclusion that the contract of insurance between the insurance company and the insured, in such a case as this, makes the insurance company the unquestioned party in interest, and, not only that, but the unqualified, controlling party interested in the defense. The sole object of such a contract as that existing between the insurance company and the insured, as well as the principle now contended for, is that the case may proceed in the name of an ostensible party controlled and directed by the insurance company, both as to himself and his witnesses, as well as the attorneys, and yet the court and the jury shall be wholly oblivious of that fact.

If motives, bias and interest of witnesses, and the situation of witnesses, with respect to parties and the subject of litigation, are each a proper and necessary subject for consideration of juries, cross-examination must proceed upon the basis of the actual facts of the case as to the real parties in interest who will be substantially affected by the outcome. What may be essential to the true development of the actual facts, in order that these actual relations may be shown, certainly is proper cross-examination. It would seem, therefore, that questions eliciting the fact of the existing insurance and the relations sustained by each witness to the insurance company must be permitted. If they are not permitted, the ordinary right of cross-examination is denied, and a litigant is thus deprived of his "rights of proof" to which the ordinary application of the rule entitles him.

It may be said in passing that this court is committed to the fact that, as a matter of law, where a party offers a witness in proof of his cause, he vouches for him, that is, represents him as worthy of belief. Masourides v. State, 86 Neb. 105, 125 N. W. 132; Krull v. Arman, 110 Neb. 70, 192 N. W. 961; Nathan v. Sands, 52 Neb. 660, 72 N. W. 1030.

In the form of the proceeding before us the real defendant, though unnamed apparently, as a matter of fact, seeks to avail himself of the benefit of the vouchments of the ostensible party defendant. Under the terms of the contract of insurance, it cannot be said that the witness apparently called and vouched for, as to veracity and standing by the apparent defendant, is in fact, his witness, when he is actually selected and called as the witness of the real party in interest, the insurance company, and entitled to no other vouchment. Indeed, the entire theory of legal procedure outlined in these contracts for liability insurance contemplates a proceeding carried on secretly, by a real, though unknown, party in interest, making use of concealment and deception. Its essential nature is therefore incompatible with an "open court" and judgments publicly and openly arrived at. To compel and permit such proceeding is to countenance and participate in what is tantamount to a fraud.

Lastly, it is thought the procedure contemplated in these liability insurance contracts, whereby the defense, though actually made and controlled by the insurance company, is concealed by the name of the ostensible defendant, is opposed to a just and enlightened public policy. It is certainly patent that for courts to encourage, recognize, enforce and aid, especially by means of a benevolent concealment, the carrying out of this portion of the contracts of insurance companies, is to judicially invite,

conceal and promote into the liability insurance world evils similar in nature to those referred to in Lancashire Ins. Co. v. Bush, 60 Neb. 116, 82 N. W. 313. In addition, the invitation thus extended would carry with it assurance to those tempted to wrong that there would be no relief for the unfortunates, and no retribution for the wrongdoer, because the wrongdoers would judicially be concealed, and in the records of our courts their names would not appear or be known. Still, underneath the veil of procedure, or behind the mask, maintained by precedent, will inevitably be developed in truth, with passing time, the same vexatious and oppressive resisting of payments, justly due, the same persistent endeavor to secure for themselves, under and in the name and shadow of the assured, an escape from just liability that characterized the fire insurance business of the recent past.

It would seem that the doctrine of "Open Court" with judgments openly arrived at, and also "Equality before the law" are principles that public good cannot permit to be limited, qualified, or abandoned, openly or in secret, judicially or otherwise.

It follows, therefore, there must be one rule of cross-examination applied irrespective as to whether litigants are natural persons or corporate bodies, and that the rule in Miller v. Central Taxi Co., 110 Neb. 306, 193 N. W. 919, is right and should be adhered to. Therefore, this court, under the provisions of section 25, art. 5, of the Constitution of Nebraska, for the effectual administration of justice, reiterates and confirms the doctrine that,

"Where a plaintiff in a personal injury action seeks by appropriate interrogatories on the cross-examination to discover whether the defendant is indemnified from loss by an insurance company, it is error for the court to sustain an objection to interrogatories which tend to develop the fact on that question." Miller v. Central Taxi Co., supra.

And this rule is hereby promulgated as a rule of practice for all courts in this jurisdiction.

And, indeed, on broader grounds, when we consider the enhanced efficiency of the automobile, the ever-increasing numbers in active use, the increased improvements of our highways, and the increase in the number of protective policies of insurance issued to automobile owners, and then call to mind the astounding list of casualties on our public roads, we are impelled to seek for the cause of this wreckage of property and destruction of life and limb. It cannot be the automobile, or the highway, alone. If not there, may it not rest in those who operate these machines of pleasure and usefulness on our public thoroughfares? The ever-increasing casualties are all out of proportion to the increasing number of automobiles used. Are we not thus driven to conclude that, when such insurance is arranged for, the feeling of liability, as well as responsibility, on the part of the individual insured is lessened, and that thereby recklessness or lack of ordinary care is bred, rather than ordinary care held in statu quo or greater care promoted? Should not such questions be one for the jury or court trying the case as any other fact submitted for consideration, not as a question of intent on the part of the party causing the claimed injury, but as such fact may bear on the question of his care or lack of care or negligence in the particular case?

It follows that the judgment of the district court is reversed and remanded for further proceedings in conformity with this opinion.

In a dissenting opinion concurred in by three judges the authorities and arguments contra are stated.

A CURIOUS WILL

There is said to be a "well authenticated case of a will written in chalk on a barn door, although no one seems ever to have been able to find the report. And then there is "Mr. Meeson's Will," which was tattooed on the back of the beneficiary's fiancee, according to Rider Haggard. The latest freak will is one on an empty egg-shell, which was propounded for probate in England. Re Barnes, 162 L. T. 160. The testator was a pilot. Some months after his death the widow found on top of a wardrobe in the room wherein he died an egg-shell on which was written in his handwriting the words: "17— 1925. Mag. Everything i possess.—J. B." The court held that the words did not sufficiently show a dispositive intent, and that even if they did so, there was no evidence that the will was made "at sea" so as to be valid under the Wills Act without attestation.

DIGEST OF IMPORTANT DECISIONS

The name of the state is printed in bold face type to enable you to select cases from any particular state. The cases from the National Reporter System are copyrighted by the West Publishing Co., St. Paul, Minn., from whom a copy of any such decision may be obtained for 25 cents.

ACCIDENT INSURANCE

Insured compelled by acute glaucoma to be indoors except for trips to doctor's office and exercise at doctor's direction, when she was necessarily accompanied by another person, held "strictly and continuously confined within the house, and therein under the regular care of a physician," within health insurance policy. Stewart v. Continental Casualty Co., 250 P. 1084, **Wash.**

ACTION

Purpose of declaratory judgment, under Civil Practice Act 473, and Civil Practice Rules 210-214, is to afford security and relief against uncertainty, and to guide parties to contract as to their future conduct, with a view to avoid litigation, rather than in aid of it. Insurance agent, wrongfully discharged before termination of employment contract and notified that commissions on renewals provided for in contract would not be paid in future, had adequate remedy at law for anticipatory breach of contract, and was not entitled to declaratory judgment, defining his rights under contract. Loesch v. Manhattan Life Ins. Co. of New York, 218 N. Y. Supp. 413, **N. Y.**

Failure to serve summons for nearly four years after suit was filed, although defendant for portion of time openly maintained residence within district to plaintiff's knowledge, held to justify conclusion that cause was discontinued and abated, although alias and pluries summonses had been issued from time to time and returned "not found." Bowen v. Wilson, 15 F. (2d) 733, **D. C.**

BANKRUPTCY

Defense, in answering affidavit of bankrupt in proceeding to have him turn over books and papers, that he lost them by leaving them in taxicab, while taking them home from place of business, held properly stricken as sham, and turn-over order then made on statement in petition was after due hearing. In re J. M. Jackson Co., 15 F. (2d) 614 **N. Y.**

BILLS AND NOTES

As respects place of contract, names of hotel and city printed on stationery, preceding date line and body of note, held no part of note itself. Finley v. Thorne, 210 N. W. 952, **Iowa.**

CONSTITUTIONAL LAW

Defendant, by accepting hunter's license and exercising the privilege under the restrictions and limitations of statutes, particularly one requiring him to submit to inspection and counting of quail in his possession by game warden, waived constitutional rights invoked so far as applicable to facts. State v. Bennett, 288 S. W. 50, **Mo.**

DEATH

Recovery by administrator for death and conscious suffering of his decedent from abortion held barred, where decedent, by voluntarily participating in a procurement of miscarriage on herself, joined in act prohibited by state law. Szadiwicz v. Cantor, 154 N. E. 251, **Mass.**

EMINENT DOMAIN

Where placing of side tracks and lead track by railroad, on land condemned for a public use, was a use for which it was condemned, damages resulting therefrom, for which owner received compensation in condemnation proceedings, cannot be claimed again by his successor in title, but later erection and maintenance of coal chute by railroad held not done for public benefit, but for private convenience of railroad, and successor in title may recover damages therefor. Chesapeake & O. Ry. Co. v. Ricks, 135 S. E. 686, **Va.**

EXTRADITION

Paroled convict, who came to New York by express direction of authorities of state granting parole to accept offer of employment, held extraditable as "fugitive from justice," after parole was lawfully revoked by Governor of demanding state. People ex rel. Hutchings v. Mallon, 218 N. Y. Supp. 433, **N. Y.**

GIFTS

Indorsement of bank stock to son never delivered to anyone, or transferred on books of bank, but remaining in control and possession of donor, is not effective as gift inter vivos. Bowles v. Rutroff, 288 S. W. 312, **Ky.**

A promissory note transferred by the maker to the payee named therein as a gift is not enforceable by the payee against the estate of the maker; but where the payee of such note, during the lifetime of the maker, and with his knowledge and acquiescence, credits on the note a sum paid him by the maker, the maker's estate will not be entitled to credit for such sum in a suit by the payee to recover the note and other notes found to be valid, though the latter were due and payable at the time the credit was made. McKinney v. Rhineheart, 135 S. E. 654, **W. Va.**

HOMICIDE

In trial of town marshal for maliciously shooting and wounding another with intent to kill, defendant's testimony held to entitle him to instruction that, if prosecuting witness was drunk and disorderly in defendant's presence, defendant had right to arrest him without warrant, and if he attempted by force or violence to effect his release from custody after arrest, he committed a felony in defendant's presence, authorizing defendant to arrest him on felony charge and use force necessary to effect arrest or prevent escape from custody, even to shooting and wounding him. Bentley v. Commonwealth, 288 S. W. 295. **Ky.**

HOSPITALS

Plaintiff, seeking to recover damages from sanitarium for death of wife, alleged to have resulted from defendant's failure to provide against self-inflicted injuries, held not required to prove wife was insane, where petition did not allege insanity. Smith v. Simpson, 288 S. W. 69, **Mo.**

HUSBAND AND WIFE

Provision of separation agreement that wife would not remove personalty claimed by her, with certain exceptions without husband's written consent, without time limitation, held not to deprive wife of title if husband arbitrarily refused consent, but was mere prohibition against removal, except as prescribed, or at most until judicial adjudication, and implied a reciprocal obligation of husband not to arbitrarily withhold consent. Clayburgh v. Clayburgh, 218 N. Y. Supp. 457, **N. Y.**

INTERNAL REVENUE

Loss of good will of malting company as result of prohibition cannot be a basis for deduction of income tax under Revenue Act 1918, § 234 (a) (4), in absence of showing that such loss was not reflected in general loss resulting from sale of property for depreciated value. Red Wing Malting Co. v. Willcuts, 15 F. (2d) 626, **Minn.**

INSURANCE

Testimony of insured's bookkeeper that she called office of insurer's agent over telephone and gave notice that property was being moved, and was assured that removal would be noted on policy, though contradicted, held sufficient to sustain finding of oral notice of removal and waiver of stipulation requiring written indorsement on policy. Fidelity Union Fire Ins. Co. v. Campbells, 288 S. W. 255, **Tex.**

JUDGMENT

Defendant's failing to defend action against him held excusable, warranting setting aside default judgment where attorney employed to defend case negligently failed to do so, and motion to set aside judgment was made immediately after notice of its rendition. Helderman v. Hartsell Mills Co., 135 S. E. 627, **N. C.**

MALICIOUS PROSECUTION

One acting in good faith on advice of reputable counsel, after full disclosure of facts, is considered to have probable cause, and is not liable in damages for malicious prosecution, though such advice was wrong. Evans v. Michaelson, 135 S. E. 683, **Va.**

MASTER AND SERVANT

Petition by railroad watchman for injury from ice falling on platform on which he placed it for splitting, alleging lighting arrangement was inadequate, his complaint thereon and promise by railroad's agent that light would be installed, but that danger from insufficient light was not so great person of ordinary prudence would not have worked at platform until light was installed, held sufficient as against demurrer. Evans v. Central of Georgia Ry. Co., 135 S. E. 760, **Ga.**

MOTOR VEHICLES

Statute providing that buildings used for storing of personal property except grain and seed shall be storage warehouses and requiring owners thereof to acquire license and give bond, held not to apply to housing of motor vehicles kept by owners for frequent use, but held to apply to housing in winter of motor vehicles not kept in condition for constant use, and one housing some motor vehicles intended for constant use by owners and others for winter storage not intended for such use must as prerequisite to continuing latter class of storage, comply with statute. Wegner v. Murphy, 210 N. W. 986, **S. D.**

MUNICIPAL CORPORATIONS

City may not enter on private property to remove snow and ice from roof of building or take measures to prevent its fall into street, on ground that it constitutes nuisance. City is not liable for failure to warn pedestrians of danger that snow and ice might fall from roof of building not within limits of street. Klepper v. Seymour House Corporation of Ogdensburg, Inc., 218 **N. Y.** Supp. 476.

A municipal corporation owning, operating and maintaining an electric lighting plant under chapter 47 of the W. Va. Code does not have power, expressed or implied, to construct lines beyond its corporate limits and thereby supply customers with electricity beyond such limits. And if it does so its act is ultra vires, and it is not liable for death caused. Hyre v. Brown, 135 S. E. 656, **W. Va.**

PARTNERSHIP

Where judgment was recovered against partner individually by person injured by partner's sole negligence in operating partnership automobile in firm business, partner was not entitled to contribution by co-partner on dissolution of partnership. Kiffer v. Bienstock, 218 N. Y. Supp. 526, **N. Y.**

Partnership, to which another firm, of which deceased partner was also a member, was indebted, may retain sufficient sum from net value of his interest to pay debt in full, without first trying to collect it from such other firm; his liability being primary as between him and creditor firm. Hoover's Ex'rs v. Bowers, Hoover & Co., 135 S. E. 698, **Va.**

TRUSTS

Where trust agreement made no provision for compensation for services as trustee, allowance therefor could not be made. Bennett v. Weber, 154 N. E. 105, **Ill.**

WORKMEN'S COMPENSATION

Employee killed by train when voluntarily taking short cut across tracks on way to work, held not killed in course of employment, within Workmen's Compensation Act. When employee chooses to go over route more dangerous than that afforded to public, his act in so doing is not incident to his employment. Dambold v. Industrial Commission, 154 N. E. 128, **Ill.**

To sustain an award under the Workmen's Compensation Act, expert witness, called to show that disabled condition of employee is result of injury alleged, must testify that, in his professional opinion, result came from cause alleged, and not that it might have come or probably came from such cause. Gibb v. New Field By-Products Coal Co., 135 Atl., 207. **Pa.**

Under Workmen's Compensation Act typhoid fever, contracted by employee as result of impure water or food furnished by employer, is not compensable injury. Buchanan v. Maryland Casualty Co., 288 S. W. 116, **Tex.**

INDEX TO CURRENT LEGAL PERIODICALS

The Cyc-Corpus Juris Classification is Used Herein

The titles of articles are printed in large capitals, and the author's name is given. The other materials digested are notes or comments on cases or law points, and the principal case discussed is given with the decided point. Case notes that merely state what the opinion held are excluded. Only articles and notes that would be of practical value are included. A classified cumulative index will later be given, so that it will not be necessary to search through each prior number. A cumulative table of cases commented on will be given when it becomes necessary for convenient search.

The references to legal periodicals are by volume and page, except where otherwise indicated. Thus, 39 Harv. L. R. 82-100, refers to volume 39, page 82 of the Harvard Law Review. The length of the article is indicated by the page numbers. Thus, the article referred to is 19 pages long, covering pages 82 to 100, inclusive.

The abbreviations used (other than conventional) are as follows:

Am.—American.
B.—Bulletin.
C. L. J.—Central Law Journal.
J.—Journal.
L.—Law or Legal.
Q.—Quarterly
R.—Review.
Reg.—Register.
Rep.—Reporter.
U.—University.

ANIMALS

Tort—Trespass by Animal. [Buckle v. Holmes, (1926) 2 K. B. 125, **English.**] 25 Mich. L. R. 207.

ARREST

When Is a Crime Committed in an Officer's Presence? [Edwards v. State (1926), 208 N. W. 876, **Wis.**] 25 Mich. L. R. 186.

BANKRUPTCY

AMENDMENT OF THE BANKRUPTCY ACT (I). By **James Angell McLaughlin.** 40 Harv. L. R. 341-391.

Interest of Bankrupt Depending on Survival Passes to Trustee in Bankruptcy. [Reilly v. Mackenzie, 134 Atl. 502, **Md.**] 13 Va. L. R. 131.

BANKS AND BANKING

Constitutional Law—Corporate Shareholder's Statutory Liability—Method of Enforcement—Amount of Assessment Conclusive—Due Process of Law. [American Bank & Trust Co. v. Bennett, 134 S. E. 781, **Ga.**] 13 Va. L. R. 131.

Payment of Unaccepted Check—Rights of Payee Against Drawee Bank. [Gordon Fireworks Co. v. Capital Nat. Bank, 210 N. W. 263, **Mich.**] 13 Va. L. R. 130.

Insolvency—Priorities—State's Priorities in Assets of Insolvent Depository—Waiver of Priority Right. [In re Holland Banking Co., 281 S. W. 702. **Mo.**] 40 Harv. L. R. 322.

BILLS AND NOTES

Accommodation Indorsers—Extinction of Principal's Obligation to Creditor to Procure Surety as Consideration for Accommodation Indorsement. [Van Houten v. Van Houten (1926), 209 N. W. 293, **Iowa.**] 26 Columbia L. R. 1029.

Contracts—Estoppel—Recovery Against One Who "Ratifies" His Forged Signature to a Note. [Marsh v. State Bank & Trust Co. (1926), 284 S. W. 380, **Tenn.**] 26 Columbia L. R. 1026.

Alteration—Treasury Drafts Paid by Treasury Department in Ignorance of Alteration of Amounts—Action by Government to Recover Difference Between Original and Raised Amounts. [United States v. Nat. Exchange Bk. (1926), 46 **Sup. Ct.** 388.] 26 Columbia L. R. 1030.

CONFLICT OF LAWS

Recognition of Child Legitimated Under Law of Another State. [Holloway v. Safe Deposit & Trust Co. (1926), 134 Atl. 407, **Md.**] 25 Mich. L. R. 189.

Inheritance by Adopted Child. [Frey v. Nielson (1926), 132 Atl. 765, **N. J.**] 25 Mich. L. R. 189.

Contract of Sale with Option for Repurchase in Another Jurisdiction—What Law Governs Repurchase. [Youssoupoff v. Widener, 215 **N. Y.** Supp. 24.] 27 Columbia L. R. 1024.

Acquisition of Foreign Domicile and the Doctrine of Renvoi. [In re Annesley (1926), 1 Ch. 821, **English.**] 25 Mich. L. R. 174-176.

CONSPIRACY

Torts—Inducing Breach of Contract to Marry. [Ableman v. Holman, **Wis.**, 208 N. W. 889.—No action lies against a third party for inducing a breach of contract of marriage.] 25 Mich. L. R. 89.

CONSTITUTIONAL LAW

Due Process—Phillipine Chinese Bookkeeping Act. [Yu Cong Eng. v. Trinidad, 46 **Sup. Ct.** 619.] 25 Mich. L. R. 190.

Anti-Trust Acts and Co-operative Marketing Associations—Validity of a Former Act Which is Not Specifically Amended or Re-Enacted by a Subsequent Unconstitutional Act but Merely Stated Not to be Subject Thereto—Classification. [Beatrice Creamery Co. v. Cline. 9 **F.** (2d) 176.—Colorado Anti-Trust Act prohibiting combinations tending to restrict trade or commerce was declared unconstitutional, in view of Colorado Co-operative Marketing Act, enacted several years afterward, which permitted such combinations among producers of agricultural products.] 21 Ill. L. R. 378.

CONTRACTS

Nominal Consideration—One Dollar Sufficient in Option to Buy Land. [Sulzberger v. Stein-

hauer (1926), 209 N. W. 68, **Mich.**] 25 Mich. L. R. 191.

Quasi Contracts—Money Paid Under Mistake of Fact—Recovery from Agent—What Constitutes Payment Over to Principal. [British American Continental Bank v. British Bank for Foreign Trade, 1926, 1 K. B. 328. **English.**] 40 Harv. L. R. 326.

Trade Regulation—Covenant by Employee Not to Engage in Similar Employment After Termination of Service—Covenant Unenforcible as Too Broad. [Stephens v. Kuhnelle (1926), 26 S. R. 327, **New South Wales.**] 26 Columbia L. R. 1041.

CRIMINAL LAW

Expression of Opinion by Prosecuting Attorney to Jury. [Griggs v. State (1926), 109 So. 611, **Ala.** 25 Mich. L. R. 203.

Evidence — Private Knowledge of Jurors — Tasting Liquor to Determine Whether It is Intoxicating. [Nix v. City of Andalusia (1926), 109 So. 182. **Ala.**] 25 Mich. L. R. 198.

Jurisdiction of Person as Affected by Illegality of Arrest. [People v. Miller, 209 N. W. 81, **Mich.**] 25 Mich. L. R. 193.

Search and Seizure—Validity of Affidavit and Warrant. [Alexander v. State (1926), 248 Pac. 873, **Okla.**] 25 Mich. L. R. 194.

CURTESY

Protection of Inchoate Right of Curtesy After a Partition Sale. [Mullen v. Mullen, 129 Atl. 749, Aff'd. 132 Atl. 230, **N. J.**] 26 Columbia L. R. 1037.

DAMAGES

Recovery of Counsel Fees. [Popke v. Hoffman (1926), 153 N. E. 248, **Ohio.**] 25 Mich. L. R. 195.

ELECTION OF REMEDIES

Pleading and Practice—Bringing Two Inconsistent Actions at Same Time. [Socolow v. J. & A. Stone Realty Co. (1926), 76 **N. Y.** L. J. 216.] 26 Columba L. R. 1033.

EVIDENCE

PRELIMINARY QUESTIONS OF FACT IN DETERMINING THE ADMISSIBILITY OF EVIDENCE. By **John MacArthur Maguire** and **Charles S. S. Epstein.** 40 Harv. L. R. 392-430.

Statements Made to Physician Concerning Bodily Condition Held Admissible. [Boyle v. Philadelphia Rapid Transit Co. 134 Atl. 446, **Pa.**] 13 Va. L. R. 133.

EXECUTORS AND ADMINISTRATORS

Quasi-Contracts—Recovery for Services Rendered to a Member of the Same "Family." [In re McDonald's Estate (1926), 133 Atl. 884, **N. J.**] 26 Columbia L. R. 1035.

FEDERAL COURTS

THE BUSINESS OF THE SUPREME COURT OF THE UNITED STATES—A STUDY IN THE FEDERAL JUDICIAL SYSTEM. By **Felix Frankfurter** and **James M. Landis.** 40 Harv. L. R. 431-468.

Equity Procedure—Duty of Court, Sua Sponte, to Dismiss Action When There is an Adequate Remedy at Law. [Denison v. Keck, 13 **F.** (2d) 384.] 25 Mich. L. R. 196.

HOMICIDE

Evdence—Burden of Proof—Erroneous Instruction Cured by Correct One on Same Subject. [Tritthart v. State (1926), 247 Pac. 1111, **Okla.**] 25 Mich. L. R. 197.

HUSBAND AND WIFE

Power of Grantor to Create a Tenancy by Entirety in Himself and His Wife. In re Farrand, 214 **N. Y.** Supp. 793.] 26 Columbia L. R. 1036.

INDICTMENTS AND INFORMATIONS

Joinder of Counts Charging Separate Felonies. [State v. Link (1926), 286 S. W. 12, **Mo.**] 25 Mich. L. R. 192.

INTERNAL REVENUE

What is a "Public School" for Purpose of Income Tax Act? **Note.**—70 Solicitors' J. 1210-1211.

INTOXICATING LIQUORS

Employee Knowing That Employer Has no License to Sell Intoxicating Liquors, Cannot Recover Share of Profits of Such Business. [Rosenthal v. Ostrow, 134 Atl. 384, **Pa.**] 13 Va. L. R. 135.

Searches and Seizures—Entry and Search of Rooms in a Building Without Warrant Held Unlawful. [Schroeder v. United States, 14 **F.** (2d) 500.] 13 Va. L. R. 136.

Evidence—Judicial Notice—Intoxicating Properties of "Home Brew." [Keen v. U. S. 11 **F.** (2d) 260.] 25 Mich. L. R. 198.

JUDGMENT

Judgment Vests no Estate in Land but Only Gives Creditor Right to Have Land Appropriated to Satisfaction Thereof. [Farrow v. American Eagle Fire Ins. Co. of New York, 134 S. E. 427, **N. C.**] 13 Va. L. R. 134.

LANDLORD AND TENANT

Right of Tenant at Sufferance to Maintain Trepass Quare Clausum Fregit Against Landlord. [Gower v. Waters (1926), 132 Atl. 550, **Me.**] 25 Mich. L. R. 201.

LIABILITY INSURANCE

Trial Practice—Reversible Error in Informing Jury That the Defendant is Insured Against Liability. [Ross v. Willamette Valley Transfer Company (1926), 248 Pac. 1088, **Ore.**]. 25 Mich. L. R. 208.

LIBEL AND SLANDER

Privilege—Petty Legislative Bodies. [Tanner v. Gault (1925), 153 N. E. 124, **Ohio.**] 25 Mich. L. R. 202.

LIFE INSURANCE

Insured's Execution for Crime as a Bar to Recovery. [Allen v. Diamond (1926), 13 **F.** (2d) 579.] 25 Mich. L. R. 200.

LIMITATION OF ACTIONS

The N. Y. Statutes of Limitation—Application to Non-Residents. **Note.**—76 N. Y. L. J. 1524 and 1546.

MONOPOLIES

HISTORICAL DEVELOPMENT OF THE LAW OF BUSINESS COMPETITION, II. By **Franklin D. Jones.** 36 Yale L. J. 207-234.

Resale Price Maintenance. [American Tobacco Co. v. Federal Trade Commission, 9. **F.** (2d) 570.—Practice of tobacco manufacturer in refusing to sell his products to wholesaler or jobber in Philadelphia territory who resold to retail trade at price less than that fixed by Wholesale Tobacco Dealers' Association of Philadelphia, held to be fair and reasonable.] 21 Ill. L. R. 389.

NEGLIGENCE

Torts—Liability of Landowner to One Injured on His Premises. [Sedita v. Steinberg, **Conn.,** 134 Atl. 243.—Defendant's negligence is for jury where space between sidewalk and defendant's building was paved and 9-year-old plaintiff went upon paved part and fired toy gun into pipe leading to defendant's gasoline tank.] 25 Mich. L. R. 90.

Collision with Animal Running at Large. [Hansen v. Kemmish, **Iowa,** 208 N. W. 277.—Injury caused by collision of automobile with boar; Fox v. Koehnig, **Wis.,** 209 N. W. 708.—Injury caused by collision of automobile with horse.] 25 Mich. L. R. 91.

PRINCIPAL AND SURETY

Availability to Accommodation Indorser of Claim of Principal Obligor Against Holder for Partial Failure of Consideration. [Seager v. Ocean Ave. Realty Corp. 217 **N. Y.** Supp. 471.] 26 Columbia L. R. 1035.

PROPERTY

THE ENGLISH REAL PROPERTY ACTS OF 1925. By **George P. Bickford.** 25 Ohio L. B. & R. 103.

"LEGAL" AND "EQUITABLE" INTERESTS IN LAND UNDER THE ENGLISH LEGISLATION OF 1925. By **Merrill I. Schnebly.** 40 Harv. L. R. 248-291.

PUBLIC SERVICE

Public Utilities—Statutory Review by the State Supreme Court of a Decision by the Commission. [Clark v. Denver & I. R. Co., 239 Pac. 20, **Col.**] 25 Mich. L. R. 178.

SALES

Recourse Against the Buyer in a Letter of Credit Transaction. **Note.**—40 Harv. L. R. 294-297.

Liability of Manufacturer to Retailer for Violation of Weights and Measures Law. [Abounder v. Strohmeyer and Arpe Co., 217 App. Div. 43, 215 **N. Y.** Supp. 702.] 75 Pa. L. R. 164-168.

SPECIFIC PERFORMANCE

By Purchaser of Manufactured Article. [Dahlstrom Metallic Door Co. v. Evatt Constr. Co. (1926), 152 N. E. 715, **Mass.**—Purchaser of elevator enclosure specially manufactured for him, is entitled to specific performance of the contract, because of inability to quickly procure same elsewhere.] 25 Mich. L. R. 195.

STATUTES

Title and Subject of Act—Minor Provisions Consistent with General Subject Need Not be Expressed in Title. [People v. Stacker, 153 N. E. 354, **Ill.**] 13 Va. L. R. 137.

SUNDAY

Selling Gasoline on Sunday Held Not a Work of Necessity or Charity. [Rhodes v. City of Hope, 286 S. W. 877, **Ark.**] 13 Va. L. R. 139.

TAXATION

Inheritance—Equitable Conversion. [Commonwealth v. Presbyterian Hospital in Philadelphia (1926), 134 Atl. 427, **Pa.**] 25 Mich. L. R. 204.

TORTS

Liability of Third Person for Inducing One Not to Contract. [Goldman v. Harford Road Bldg. Ass'n (1926), 133 Atl. 843, **Md.**] 25 Mich. L. R. 206.

Torts—Recovery for Mental Suffering. [Johnson v. Sampson, **Minn.,** 208 N. W. 814.—Girl entitled to recover for mental anguish caused by false accusation of fornication — violated statute.] 25 Mich. L. R. 92.

Torts—Deceit—Representations to Securities Commission as Basis for Action. [Dinsmore v. National Hardwood Co., **Mich.,** 208 N. W. 701.—Material misrepresentations by Delaware Corporation as to its status to Michigan securities commission to get permit to sell securities, do not entitle a purchaser of such securities to bring action for fraud and deceit against it.] 25 Mich. L. R. 86.

TRIAL

Special Assessments—View of Premises. City of Carbondale v. Reith, 316 Ill. 538.—In proceeding for levy of special assessment for local improvement, held to be error for judge to view premises without knowledge or consent of parties to the cause. 21 Ill. L. R. 393.

TRUSTS

Power of Trustee to Purchase Trust Property. [Morgan v. Wright (1926), 3 W. W. R. 109, **Canada.**] 26 Columbia L. R. 1042.

USURY

When Available as Defense and When as Ground for Affirmative Relief. [Yormark v. Waldman, 217 **N. Y.** Supp. 501.] 26 Columbia L. R. 1042.

WILLS

THE COMPETENCY OF TESTAMENTARY WITNESSES. By **Alvin E. Evans.** 25 Mich. L. R. 238-269.

IS THE RULE IN SHELLEY'S CASE ABOLISHED AS TO WILLS? By **Thomas Amory Lee.** 25 Mich. L. R. 215-237.

Scope of Soldier's Power to Make a Nuncupative Will. [In re Mallery's Will, 217 **N. Y.** Supp. 489.] 26 Columbia L. R. 1044.

WORKMEN'S COMPENSATION

Compensation Receivable When Injured Employee Has Entered into Concurrent Contracts of Employment—Effect of Concurrent Employer's Not Operating Under Act. [Walton v. Electric Service Co. (1926), 247 Pac. 846, **Kan.**] 26 Columbia L. R. 1044.